AUG 3 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-74-64

MARIE ABATE, *et al.*,

Petitioners,

vs.

PITTSBURGH PLATE GLASS COMPANY, *et al.*,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In the

Supreme Court of the United States

October Term, 1974

No. 74-.....

Marie Abate, *et al.*,

Petitioners,

vs.

Pittsburgh Plate Glass Company, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review the judgment entered in the above-entitled case on April 4, 1974, rehearing of which was denied May 7, 1974.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 494 F.2d 799 (1974) and set forth in the appendix, *infra*, at pp. 1a ff. The order denying rehearing and rehearing *en banc* is as yet unreported; it is set forth in the appendix, *infra*, at pp. 11-a ff. The opinion of the United States District Court for the Western District of Pennsylvania is reported at 59 F.R.D. 616 (June

12, 1972) and is set forth in the appendix, *infra*, at pp. 14-a ff.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 4, 1974 and motion for rehearing was denied on May 7, 1974.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 United States Code, Section 1254(1), review of a judgment of the United States Court of Appeals for the Third Circuit having been requested.

Question Presented

1. Did the court below err in upholding the district court order, approving the compromise and settlement of all issues in this class action claiming sex discrimination under Title VII of the Civil Rights Act of 1964 (42 United States Code, § 2000e, *et seq.*) where:

A. One fifth of the members of the class and one quarter of those with timely charges filed with the Equal Employment Opportunity Commission objected to the terms of the settlement; and

B. Only a small percent of one of three elements of relief prayed for was realized under the terms of the settlement; and

C. The only opportunity class members had to exclude themselves from further participation in the action came immediately prior to trial and made no mention of the fact of or terms of settlement discussions.

Statutory Provisions Involved

1. This case involves the provisions of Rule 23, Federal Rules of Civil Procedure, fully set forth in the appendix, *infra*, at p. 20-a ff.

2. This case also involves various provisions of Title VII of the Civil Rights Act of 1964, 42 United States Code, § 2000e, *et seq.*, relevant portions of which are fully set forth in the appendix, *infra* at p. 24a ff.

Statement

Petitioners here constitute approximately one fifth of the original class of plaintiffs in this action, who sought to object to the settlement of this action when first proposed in the district court in January of 1973.[1]

The facts underlying this action for sex discrimination under Title VII of the Civil Rights Act of 1964 (hereafter "Title VII") actually arose much earlier in the 1940's. At that time, respondent Pittsburgh Plate Glass (hereafter "PPG") was, as it now is, engaged in the fabrication of glass products at the Creighton, Pennsylvania plant. Beginning in 1943 each of the plaintiffs sought and obtained work at the Creighton plant. As hourly employees of PPG's Creighton plant, each of the plaintiffs was also represented by the respondent union here, in a series of collective bargaining agreements extending to the present time.

By the early 1950's, PPG had found it necessary to begin laying off employees in their order of seniority. The class

[1] During the course of these proceedings the exact number of plaintiffs objecting to the settlement has varied. The percentages have remained the same, and therefore do not significantly alter the percentages here.

of plaintiffs in the present action, with seniority dates ranging from August 12, 1943 to August 2, 1951, were accordingly affected by these lay-offs, together with numerous of their male counterparts.

The late 1950's and early 1960's saw increased production at the PPG Creighton plant. Accordingly furloughed employees were recalled in order of seniority, until by 1966 each furloughed male employee had been recalled to the Creighton plant. However, none of the original 452 women who comprised the original class of plaintiffs in this action were recalled. And when, in 1966, PPG began to hire new employees at the Creighton plant, all of those hired were male, while the 452 furloughed women remained unemployed.[2]

Contemporaneously with the recall process affecting male employees, PPG also sought in the early 1960's to alter the seniority provisions in the collective bargaining agreement which guaranteed employees on layoff "perpetual" seniority. Thus, in 1962 PPG sought to alter its seniority system by adding a provision to the collective bargaining agreement which would automatically terminate anyone on lay-off for more than two years; a similar five year cut-off provision was proposed in 1964. Each of these proposals would have operated to terminate men, as well as women then on lay-off. Both proposals were rejected by the unions. Finally, on August 14, 1968, PPG and the unions agreed to a "seniority cut-off" in the collective bargaining agreement then being negotiated. That agreement ended the former "perpetual seniority" system and caused the immediate discharge of any person not actively employed with the company within the five years preceding the date of the agreement. The direct result of this agree-

[2] PPG hired its last woman into a bargaining unit position in 1951. Appendix, vol. II at p. 43 in the court below, No. 73-1697.

ment was the termination of the 452 women employees who form the class of plaintiffs in this action. No men were terminated as a result of the agreement.[3]

Notification of the terminations caused by the new seniority system came by letters dated September 26, 1968. Upon receipt thereof, some 51 women filed timely charges of sex discrimination with the Equal Employment Opportunity Commission (hereafter "EEOC").[4] The EEOC began investigation of the charges, but ultimately refused to reach a determination on the issue of whether PPG and the unions had violated Title VII's command against sex discrimination. Instead, the EEOC notified each of the charging parties of her right to sue in federal court.[5]

This action was timely begun after receipt of a right to sue letter on August 4, 1970. Plaintiffs sought full relief for the sex discrimination practiced by the company and the unions. Both defendants immediately moved to dismiss the suit on grounds that plaintiffs had failed to file timely charges of discrimination with the EEOC.[6] This motion

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[3] During this period, women employees constituted between 22 and 25% of the union's local membership. Appendix, vol. II at p. 11 in the court below, No. 73-1697.

[4] Each such charge was properly lodged with the EEOC within 90 days of the respective charging party's receipt of her letter of termination.

[5] The EEOC's failure to reach a determination in the present set of charges was the result of a conflict occasioned by the Commission's position in a second set of sex discrimination charges filed by active PPG employees. These fifteen charges, filed in 1966, claimed discrimination in the company's policy of limiting jobs to one sex. These charges were ultimately resolved in an EEOC conciliation executed on November 14, 1968. This agreement opened some, but not all, formerly male jobs. Those jobs which continued to be restricted to men only were agreed by all parties to be jobs that only men could adequately perform. Naturally, none of the present class of plaintiffs was present during these proceedings.

[6] 42 United States Code, 2000e-5(d) required, prior to its 1972 amendment, that charges of discrimination be lodged with the EEOC within 90 days of the date of the act complained of.

was denied by order of the district court entered April 21, 1971. On July 15, 1971, following initiation of pretrial discovery, the action was certified as a class action under Rule 23(b)(2), with notice waived. That order was later amended in 1972, when the action was again certified for class treatment, this time under Rule 23(b)(3). The required notice for a 23(b)(3) class was given to each of the 452 class members for the first time on July 31, 1972. That notice contained the proposed date of trial and informed class members that "[u]nless you express a desire in writing to this Court to be *excluded* from this action . . . the judgment will include you as a member of the class and you will be bound by it. If you desire to be *included* in this class action, you *do not* have to reply to this Notice[7] (original emphasis). The notice also included a statement that all class members were then being represented by the plaintiffs' lawyers, but that any class member might enter an appearance with separate counsel.

The trial of this matter proceeded in a bifurcated fashion, with liability and damages designated for hearings in that order. Plaintiffs began and completed the presentation of the merits of their case on the issue of liability in the first day of trial, held November 27, 1972. At the conclusion of this hearing, a second notice to class members was ordered. This second notice was identical in content to the previous August, 1972 notice.

The proceedings re-convened on December 21, 1972 with the defendant company's presentation of its case on the issue of liability. After a Christmas recess, the matter was rescheduled for January 8, 1973. At the beginning of this hearing, however, all counsel announced that they had reached an agreement in full and final settlement of this case. After counsel had outlined briefly the elements of

[7] Appendix, vol. I, at p. 16 in the court below, No. 73-1697.

the settlement, numerous class members, including each of the three named plaintiffs, requested and was allowed to testify to her objections to the content of the settlement proposal.[8] No class member spoke in favor of the settlement at this hearing.

Additional notification to the class membership was ordered next, in order to explain the terms of the settlement and give notice that the court had reviewed the settlement preliminarily and intended to approve it, "subject to hearing the views of individual class members". A hearing was then set for January 29, 1973, for this purpose.

At this hearing, eighty-eight class members appeared to testify against the settlement, without benefit of counsel. Their objections to the compromise fell into three categories:

> (a) The settlement offered inadequate compensation in the form of back pay, providing only 15% of back wages actually lost and resulting from the defendants' sex discrimination from 1966 to date;
>
> (b) The settlement offered no pension credits for the years plaintiffs would have worked but for unlawful sex discrimination on the part of the defendants;
>
> (c) The settlement denied the plaintiffs the right of reinstatement, irrespective of individual dates of seniority.[9]

A common thread throughout this testimony was the surprise with which the plaintiffs met the settlement. Sev-

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[8] This testimony appears in Appendix, vol. III at p. 183 ff. and 195 ff. in the court below, No. 73-1697.

[9] This testimony appears at pp. 18 ff. in the transcript of the hearing of January 29, 1973 which forms a part of the record in the court below, No. 73-1697.

eral of those testifying as to their objections noted that no previous mention of settlement had ever been made.[10] In response to these objections, the district court ordered a recess of three months, within which the objectors might obtain their own counsel and submit briefs. Argument on the question of the settlement was held on June 4, 1973 and the settlement as originally proposed, adopted and approved by order of the district entered June 12, 1973. That opinion and judgment of the district court was affirmed by the Third Circuit Court of Appeals in an opinion entered April 4, 1974. Motion for rehearing or for rehearing *en banc* was denied on May 7, 1974.

The Court of Appeals based its decision on the fact that it found approval of the settlement by the district court not an "abuse of discretion" since it was "fair and reasonable". This finding of reasonableness was premised on the following weaknesses claimed to exist in plaintiffs' case:

> (a) the seniority cut-off was for a valid business purpose and of "questionable discriminatory effect";
>
> (b) plaintiffs "appear[ed] not to have met" the requirement of filing a timely EEOC charge;
>
> (c) there was a strong likelihood that plaintiffs would properly be denied any back pay had they gone to trial;

The Court of Appeals also rejected the view of plaintiff-objectors, as well as of the EEOC as *amicus curiae*, that a majority of class members might not coerce the minority into settlement. In adopting this position, the lower court rejected pertinent decisions of other circuits in which the course of private litigants' actions were held unimpaired by actions taken by the attorney general in companion liti-

[10] Transcript of January 29, 1973 hearing at pp. 28 and 43, in the court below, No. 73-1697.

gation. See generally *Williamson* v. *Bethlehem Steel Corp.*, 468 F.2d 1201 (2nd Cir. 1972), *Air Line Stewards* v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973).

And finally the Court of Appeals rejected the view, suggested by plaintiffs, that a conflict between class members made necessary the use of sub-classes; as a proper subclass, plaintiff-objectors, petitioners here, might not be compelled to accept a settlement, unfavorable when viewed in terms of their aims for the litigation.

Reasons for Granting the Writ

This case raises a question of great importance to the increasing number of litigants seeking judicial redress from discrimination under Title VII of the Civil Rights Act of 1964: May a private litigant be compelled to settle his cause of action on terms he does not favor, merely because the majority of his fellow class members wish to accept such a settlement? This question has never before precisely been answered by this Court. Nevertheless, strong authority exists in analogous areas to prevent the compromise of an individual's rights in a settlement against his will. See *Protective Committee for Independent Stockholders of TMT Ferry, Inc.* v. *Anderson*, 390 U.S. 414 (1968).

A. *The Settlement Is Inadequate*

The settlement under dispute here involves a total amount of $1,151,824.00 in final settlement of the claims of 371 class members, each claiming back wages, pension rights and reinstatement as a result of unlawful sex discrimination under Title VII of the Civil Rights Act of 1964.[11]

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[11] This amount was allocated as follows: back pay to 371 class members—$931,724.00; attorneys' fees—$201,250.00; additional amounts to named plaintiffs—$17,500.00; expenses of the litigation —$1,350.00. See opinion of the district court, *infra*, at p. 14a ff.

As a "lump sum" dollar amount, the settlement figure is impressive. But its fairness and adequacy can only be judged when the actual amounts received by individual plaintiffs are compared with their monetary losses during the period from 1966 to a point of settlement in January of 1973. From 1966 to 1968, respondent PPG hired a total of 380 new male employees at the Creighton plant, while plaintiffs here remained on continuous lay-off. As a result, each individual plaintiff lost employment and wages, which when compared with the amounts allocated to each under the settlement, establish the percent of recovery range from a high of 26% to a low of 1%.[12] Taken as an average, the class received but 15% of the actual back wages lost as a result of the defendants' sex discrimination.

The fairness of the settlement does not rest on the dollar amount of back pay offered each class member alone. The settlement almost completely omits any reference to pension rights for class members, and completely excludes the right to reinstatement. These two omissions are the basis of petitioners' objections to the settlement here as in both courts below.

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[12] Lost wages for each of the plaintiffs has been estimated in the following manner: for each year a minimum level of earnings at PPG was calculated, based upon the lowest hourly wage stated in the applicable collective bargaining agreement. This amount, which excluded over-time, shift differentials, piece rate and all other upward variations of the basic wage, was then reduced by an amount representing "interim earnings", as required by 42 United States Code, §2000e-5(g). These interim earnings were calculated based upon the applicable minimum wage for the years involved, 1966-1973, as set forth in 29 United States Code, §203. Based on this model, each class member lost back wages amounting to $19,047.40 for the period. This figure was then compared to actual amounts allocated to individual class members, using both a high figure of $4,899.00 (Susan Halupe) and a low figure of $261.28 (Margaret Voytecky).

As women whose average age was between 45 and 65[13], petitioners saw their pension rights as the most important element of relief sought by this law suit. In order to obtain these pension rights, petitioners were ready to return to work. And as a minimum, they sought a settlement that would credit their pensions with the years they could have worked at PPG, but for the unlawful sex discrimination practiced by the defendants.

Without benefit of counsel, eighty-seven women, including each of the three named plaintiffs, testified against the settlement in the first district court hearing of January 29, 1973. And each listed pension rights as her main reason for opposing the compromise offer. One of the named plaintiffs, Elvira Kissel, expressed the groups dissatisfaction in the following words:

> "WITNESS KISSEL: As a '44 girl, January 3, I lost seven years seniority towards pension—average wage per year 7,000 times seven is 49,000. I would be in there working today. Seven years Blue Cross, that is about $540 a year; that is about 3,780 for the seven years. About 200 a year sub-pay that they pay times seven; that is 1,400. I lost vacation pay at ten percent of gross wages. I lost cost of living that they pay, sixteen cents per hour worked; I lost severance privileges. That is a total of 57,180 plus lost in seven years.
>
> "I never expected to get it all. I never expected to get half of it. But at least a third of it, we deserve.
>
> "Had they called us women and gave us the opportunity to work, these women would have their pension available to them, all this money they lost, benefits, fringe benefits. Your Honor, money isn't everything

[13] Appendix, vol. II, at p. 139 in the court below, No. 73-1697.

> but the pension is all us women have to look forward to. That is all we have to look forward to. Three months [pension credit], to me, is very, very little for what they are offering in this total package" [14]

The courts below sought to justify the limited relief afforded by the settlement,—15% of but one of three elements of relief prayed,—by resort to the rule that approval of a class action settlement requires a settlement to be fair, reasonable and adequate when judged by the strengths and weaknesses of the parties' respective cases. Leaving aside for the moment the question of how this standard, first articulated and applied in the field of antitrust and corporate reoragnization, applies to a Title VII action where individual civil rights are involved, it is apparent that plaintiffs' case displayed no such weakness as to justify so minimal a settlement award.

At the announcement of the settlement, plaintiffs had completed persentation of their case on liability. The issue of damages, essentially individual in nature, had, however, been reserved. Thus the district court had before it facts establishing to a certainty that from 1951 forward, PPG had hired and recalled male employees only. During this period *not one* new woman was hired and only a handful were recalled, leaving 452 women employees of PPG on lay-off. Having completed the process of recall for its male employees, PPG and the unions sought to terminate those women still on lay-off by revising the "perpetual seniority system" operative in the plant since the first collective bargaining agreement in 1943.

The court below recognized that given the foregoing history of *prima facie* sex discrimination, the defendant company was faced with the burden of justifying its seniority

[14] Appendix, vol II at p. 193, ff in the court below, No. 74-1697.

cut-off decision.[15] Two such justifications are possible and both were considered and improperly applied by the lower court. The "business necessity" defense was first articulated by this Court in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971). The Court of Appeals suggests that because "the termination provision was instituted to promote PPG's 'business purpose' of securing a work force of balanced age" and because the provision was of "questionable discriminatory effect", the district court might properly conclude no sex discrimination present.[16]

This rationale conflicts with both this court's decision in *Griggs*, as well as with every other major decision of courts of appeal applying the "business necessity" doctrine since *Griggs*. The fact that PPG's decision against recall and hire of its women employees on lay-off was based on valid business reasons and made in good faith does *not* establish "business necessity. This Court said in *Griggs:*

> Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. 401 U.S. at 432.

What the court below may have meant with its "questionable discriminatory effect" language is unclear. It is difficult to understand how failure to recall women employees, all the while recalling men steadily and even hiring new men for the first time, could be anything but sex discrimination.

In certain cases the business purpose may over-ride the fact of discrimination, but that seems an unlikely possibility here. "Business necessity, as first articulated by this Court in *Griggs*, and later applied by the courts of

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[15] See opinion of the court below, *infra*, at p. 4a ff.

[16] See opinion of the court below, *infra*, at p. 5a ff.

appeal, connotes something far beyond convenience. It has been described as an "irresistable demand", *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652 (2nd Cir. 1971) and as something essential to the safe and efficient operation of the employer's business, *Robinson* v. *P. Lorillard Corp.*, 444 F. 2d 791, *cert. denied* 406 U.S. 906 (1972). But here the business purpose underlying the company's termination of "perpetual seniority" has been expressed as a need to have a work force of varied age distribution.[17] That this does not rise to the level of an "irresistible demand" is seen by the fact that twice previously the same proposal was waived by PPG during collective bargaining.

The second possible defense to plaintiffs' *prima facie* case of sex discrimination is the "bona fide occupational qualification" defense embodied in Section 703(e) of the Act. The court below discusses this defense cursorily and suggests that by allegations alone, PPG has presented adequate grounds to justify the acceptance of a minimal settlement.[18]

The lower court thus appears to have misconstrued the "BFOQ" defense. This exception to sex discrimination has been narrowly applied by the courts of appeal. Unless "all or substantially all women are unable to perform a given job, disqualification of any woman, from such job category must proceed on an individual basis. See *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228 (5th Cir. 1969); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969); *Jurinko* v. *Wiegand*, 477 F. 2d 1038 (3rd Cir. 1973); and *Rosenfeld* v. *Southern Pacific Co.*, 444 F. 2d 1219 (9th Cir. 1971).

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[17] See the Brief of the Defendant-Appellee PPG in the court below at p. 11; the transcript of the proceedings in the district court held December 21, 1972 at p. 67 ff; and the opinion of the court below at p. 5a.

[18] Opinion of the lower court, *infra*, at p. 14a.

Stated differently, once a policy such as PPG's has been shown to discriminate, application of the "BFOQ" standard will, in the majority of cases, be a matter of individual proof of damages. Women employees, like their male counterparts, must be given an opportunity to compete. As the court in *Rosenfeld, supra,* noted:

> The premise of Title VII . . . is that women are now to be on equal footing with men. [citation omitted] The footing is not equal if a male employee may be appointed to a particular position on a showing that he is physically qualified, but a female employee is denied an opportunity to demonstrate personal physical qualification. Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon a showing or individual incapacity. 444 F. 2d at 1225.

In evaluating the strength of the plaintiffs' case here, the "BFOQ" defense is useless. Neither court below had before it any evidence on the individual abilities of the plaintiffs, since the issue of damages had not been reached. There could have been no basis to discount the strength of plaintiffs' claim by reliance on the "BFOQ" defense. Indeed, had there been proof indicating that some of the plaintiffs would not in 1966 or would not now be able to perform the jobs at PPG's Creighton plant, it would have been error to discount the entire case on that basis.

The court below concludes its weighing of the merits of plaintiffs' claims with a reference to two procedural defenses available to the defendants. The first concerns timely filing of the plaintiffs' several charges of discrimination with the Equal Employment Opportunity Commission, as required by 42 United States Code, § 2000e-5(e). This issue was immediately raised by both defendants in

the district court on motion to dismiss. That court found timely filing and ruled for the plaintiffs in April of 1971. This ruling was never challenged and no appeal was taken from it, yet the court of appeals concludes that "plaintiffs appear not to have met that [filing] prerequisite."[19] In support of this view it cites only *Mickel* v. *South Carolina State Employment Service*, 377 F.2d 239 (4th Cir. 1967), *cert. denied* 389 U.S. 877 (1967), a case which stands for the proposition that a charge must be filed with the EEOC prior to commencing court action under Title VII, an issue never before in question here. The significance of *Mickel* to the plaintiffs' case here is thus unclear.

Finally, the court of appeals suggests justification for the small percent of back pay offered by the settlement on the grounds that back pay awards are "discretionary" and "it is not clear that failure to award such relief [back pay] here, were plaintiffs successful, would constitute an abuse of discretion". The court concludes that "[i]n light of their defenses, we believe there is a strong likelihood that PPG and the Union would not have been held liable to plaintiffs for back pay".[20] The only authority cited for this conclusion is *Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240 (3rd Cir. 1973), a case denying back pay where sex discrimination resulted from the direct application of state protective legislation.

The decisions of the panel below is thus contrary to decisions by other panels of the Third Circuit, as well as decisions of the Fourth, Fifth, Sixth and Seventh Circuit Courts of Appeal.[21] Authority of this Court in an analo-

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[19] Opinion of the court below, *infra*, at p. 6a.

[20] Opinion of the court below, *infra*, at p. 6a.

[21] Those decisions are: *Jurinko* v. *Wiegand*, 477 F.2d 1038 (3rd Cir. 1973) and *Rosen* v. *Public Service Electric and Gas Co.*, 477 F.2d 90 (3rd Cir. 1973); *Robinson* v. *P. Lorillard Corp.*, *supra*,

gous area supports this majorirty view that, absent exceptional circumstances, back pay should be awarded where discrimination has been established. In *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968), where awards of attorneys' fees under Title II of the Civil Rights Act of 1964, 42 United States Code, § 2000a-3(b), were considered, this Court defined "discretion":

> It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. 390 U.S. at 402.

The only exception to awards of back pay has occurred in the narrow area where sex discrimination suits have arisen in the context of conflicting state protective legislation. *See, e.g., Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Manning* v. *General Motors Corp.*, 466 F.2d 812 (6th Cir. 1972); and *LeBlanc* v. *Southern Bell Telephone & Telegraph Company*, 460 F.2d 1228 (5th Cir. 1972), *cert. denied*, 409 U.S. 990 (1972). Each of these cases involved sex discrimination suits where conflicting state protective legislation existed—not at issue here. Absent such state protective legislation, a majority of circuit courts have held that back pay is the rule, not the exception, once discrimination is established.

In the area of back pay, then, "special circumstances" are narrowly construed. To date, no authority exists for the proposition that anything *but* state protective legislation conflicting with sex discrimination qualifies for treat-

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and *Moody* v. *Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) and *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); and *Bowe* v. *Colgate Palmolive*, 416 F.2d 711 (7th Cir. 1969).

ment under the exception.[22] *Kober* v. *Westinghouse Electric Corp.*, *supra*, stands for this proposition and provides no authority for weakening the case of plaintiffs here, since no protective legislation is involved.

The most that can be said in support of the lower court's reliance on *Kober* is that it erroneously attempts to extend the "special circumstances" exception to action by the EEOC. Aside from the obvious due process considerations raised, no authority supports the lower court's view that an EEOC conciliation, of which present plaintiffs had neither knowledge nor control, may be now used to reduce their valid claims for back pay under Title VII.

B. *The Court Below Erred in Denying Petitioners the Opportunity to Opt Out of the Settlement*

Petitioners argued in the court below, as in the district court, that the settlement in this action need not bind all of the plaintiffs or none of them. They suggested in the lower courts, as here, that the procedures embodied in Rule 23, Federal Rules of Civil Procedure, do not contemplate such an "all or nothing" result in class actions arising under Rule 23(b)(3). Considerations of due process under the Fifth Amendment to the United States Constitution suggest that unless private Title VII litigants are free to exercise control of their law suits, Rule 23 may be subject to constitutional attack.

Both Courts below viewed approval of the instant settlement as essentially a matter of majority rule.[23] In so doing,

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[22] For cases applying this exception, *see, e.g. Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Manning* v. *General Motors Corp.*, 466 F.2d 812 (6th Cir. 1972); and *LeBlanc* v. *Southern Bell Telephone & Telegraph Company*, 460 F.2d 1228 (5th Cir. 1972), *cert. denied*, 409 U.S. 990 (1972).

[23] At the district court hearing on the settlement's adequacy, the district court judge commented: "I have one question: Should

they attempted to apply an improper standard of review which originated in areas of corporate litigation, such as stockholder derivative actions, patent infringement suits and antitrust litigation. In areas such as these, where corporate health and activity are involved, majority approval, coupled with court review under Rule 23(e), Federal Rules of Civil Procedure,[24] insures absent class members of whether "there is any fraud or collusion in arriving at the compromise and . . . whether the compromise if fair, adequate and reasonable . . .". *Young* v. *Katz*, 447 F. 2d 431, 433 (5th Cir. 1971). In such situations, the court stands as a guardian for those class members not present. And in such cases, the rights involved are common and joint in the focus of the litigation, typically corporate well-being. See *Young* v. *Katz*, *supra*, at 432, applying the "best interests of the corporation" test as stated in *Newmirth* v. *Allen*, —— F.Supp. —— (S.D.N.Y. 1964), *aff'd*. 338 F. 2d 2 (2nd Cir. 1964).

The standards of review of class settlements involving individual interests rather than litigation on behalf of corporate funds are not identical *See, Newman* v. *Stein*, 464 F. 2d 689 464 F. 2d 689, 692 fn. 6 (2nd Cir. 1972).

This distinction was noted by this Court in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414 (1968), a proceeding

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I or should I not approve this settlement that has been stated to the Court; should 22 percent overrule 78 percent?" Appendix, vol. II at p. 253 in the court below, No. 73-1697.

[24] Rule 23(e) reads: "Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

As amended February 28, 1966, eff. July 1, 1966.

for reorganization of a corporation under Chapter X of the Bankruptcy Act. There it was stated:

> Moreover, this Court has held that a plan of reorganization which is unfair to some persons may not be approved by the court even though the vast majority of creditors have approved it. 390 U.S. 435.

Typical of the differences between cases arising under a common corporate question, and those raising both common and individual rights, are Title VII actions such as that of petitioners here, arising under Rule 23 (b)(3).[25] Insofar as the class members sought to litigate broad questions of liability for unlawful sex discrimination, the interests of the class were identical. At the point of settlement, however, individual factual differences predominate. This is so because a settlement must ultimately be negotiated in terms of back pay, which is in turn essentially an individual matter. See, *Johnson* v. *Goodyear Tire and Rubber Co., supra*, where the Fifth Circuit noted the need for "separate determinations on an individual basis as to who is entitled to recovery and the amount of such recovery", 491 F.2d at 1375. At this point it is likely that the weakest individual claims will press for a favorable settlement on the basis of the strengths of other class members' claims. This Court previously discussed this conflict in *Hansbury* v. *Lee*, 311 U.S. 32 (1940). It is stated there:

> "It is one thing to say that some members of a class may represent other members in a litigation where

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[25] Rule 23(b)(3) in relevant part states: "Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: * * * (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . ."

> the sole and common interest of the class in litigation, is either to assert a common right or to challenge an asserted obligation. [citations omitted] *It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted may be deemed adequately to represent any others of the class in litigating their interests in either alternative.* Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process required. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far." [citations omitted] 311 U.S. at 444. (emphasis added).

As a solution to this problem, petitioners suggested to both courts below that they be reconstituted as a "subclass" under Rule 23(c)(4)(B). As a subclass they might then have been allowed to "opt out" of the settlement proposal while going forward with the litigation on their own right.[26] Although such a procedure finds support in this Court's decision in *Eisen* v. *Carlisle & Jacquelin*, —— U.S. —— (1974), as well as that of *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122 (5th Cir. 1969), it was rejected by the courts below as outside the ambit of Rule 23(c).

We believe this conclusion to be error and in direct conflict with recent authority in the Seventh Circuit. Issues nearly identical to those raised here were decided along

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[26] As has been noted, petitioners here represented 25% of those originally filing EEOC charges in this action. As such numbers of them might have maintained her own action independent of the present suit. *Supra*, at p. 5.

the lines petitioners suggest in *Air Line Stewards and Stewardesses Assn., Local 550* v. *American Airlines, Inc.*, 400 F. 2d 636 (7th Cir. 1973), *cert. denied sub nom Air Line Stewards and Stewardesses Assn. Local 550* v. *Zipes*, —— U.S. —— (1974). The similarities in the actions are striking. Both are class actions raising claims of sex discrimination under Title VII. In both the class subdivided along the lines of the relief sought; in both counsel for plaintiffs negotiated a settlement without consulting the wishes of individual class members during the process; and in both a meaningful opportunity to "opt out" was lacking.[27]

Yet the results obtained by petitioners here differ markedly from those of the Seventh Circuit in *Air Lines Stewards*. That case was remanded with directions, first, that the settlement be set aside to allow for the formation of appropriate subclasses, each properly represented; and, second, so that class members might enjoy a meaningful opportunity to opt out of the litigation, if they desired. If class actions are to continue as a successful device for litigating multiple claims, the conflict between these decisions must be resolved in favor of the *Air Lines Stewards* approach. Any other decision will cause the prudent class litigants to "opt out" at the earliest opportunity as the only way to maintain a semblence of control over their lawsuits. Such a result violates the fundamental rationale behind Rule 23 as well as the principles of efficient court administration. This writ of certiorari should be granted to resolve this conflict between the Circuits and prevent the misapplication of Rule 23.

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[27] The "opt out" notice to petitioners here made no mention of the then on-going settlement negotiations and failed to suggest that plaintiffs would be bound by the results of a court approved settlement, as well as a judgment.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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